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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

Plaintiff/Appellee

v.

LUIS PARRA GOMEZ

Defendant/Appellant

Case No. 20100486-CA

REPLY BRIEF OF APPELLANT

Appeal from judgment, sentence, and commitment in the Fourth District Court, Utah County, State of Utah, the Honorable Lynn W. Davis presiding, on one count of possession of a controlled substance with intent to distribute in a drug free zone, a first degree felony; one count of possession of a controlled substance with intent to distribute in a drug-free zone, a third degree felony; and possession of drug paraphernalia in a drug-free zone, a class A misdemeanor.

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REPLY BRIEF OF APPELLANT

ARGUMENT

I. The issues raised in Gomez's appeal were preserved in the District Court.

The State argues that the issues raised in Gomez's appeal were not preserved in the District Court. Br. of Appellee, pp. 10-12, 14-15. This argument is incorrect. Gomez preserved the issues before the District Court in his timely amended motion to suppress, and this Court should decide Gomez's appeal on the merits.

The legal standards governing preservation are as follows: To preserve an issue for appeal, the Defendant must present the issue to the trial court in such a way that the trial court has an opportunity to rule on the issue. *State v. Maese*, 2010 UT App 106, ¶ 13, 236 P.3d 155. To provide the trial court with an opportunity to rule on the issue (1) the Defendant must raise the issue in a timely fashion; (2) the Defendant must raise the issue specifically; and (3) the Defendant must introduce supporting evidence or relevant legal authority. *Id.* In sum, the Defendant must raise the issue to a "level of consciousness"

before the trial court to preserve the issue for appeal. *State v. Diaz-Arevalo*, 2008 UT App 219, ¶ 10, 189 P.3d 85.

Gomez preserved the issues he presents on appeal under these standards. Gomez presents two issues on appeal: 1) Gomez was illegally detained after he initially refused consent to search his hotel room; and 2) Officer Speeth exploited the illegal detention to ultimately obtain Gomez's consent. Br. of Appellant, pp. 9-17. Gomez provided an opportunity for the District Court to rule on these issues when he raised them in his Amendment to Defendant's Motion to Suppress, filed September 23, 2009. (R. 99-77.)

The State does not appear to argue that Gomez's amended motion before the District Court was untimely, or that the amended motion failed to introduce supporting evidence or relevant legal authority. *See* Br. of Appellee, pp. 9-15. Rather, the State argues that Gomez did not specifically raise the issues presented on appeal in his amended motion. *See* Br. of Appellee, p. 12.

The State's apparent argument that the issues were not specifically raised is incorrect because Gomez did specifically raise the issues presented on appeal in his amended motion. Although Gomez's amended motion raised some issues that Gomez does not argue on appeal,¹ the bulk of the motion focused on the issues Gomez presents on appeal:

¹ In his amended motion to suppress, Gomez argued that, as an initial matter, Officer Speeth did not have reasonable suspicion to detain Gomez on a seatbelt violation. (R. 92-91.) Gomez also argued that his ultimate consent to search the hotel room was obtained by duress or coercion. (R. 83-81.) Gomez does not present these issues on appeal; however, some of the arguments made to the District Court in support of these issues are relevant to the issue of preservation, and are referenced in this reply brief.

- Pages 9-10 of the motion argued that officers did not have reasonable suspicion to further detain Gomez after the vehicle search and search of the passengers yielded nothing illegal. (R. 91-90.)
- Pages 10-17 argued that Officer Speeth's subsequent detention and questioning of Gomez concerning the hotel room was not supported by reasonable suspicion. (R. 90-83.)
- Pages 19-20 argued that Officer Speeth exploited the illegal detention to obtain Gomez's consent to search the hotel room. (R. 81-80.)

These arguments specifically raised the issues presented on appeal: that Gomez was detained without reasonable suspicion when Officer Speeth ultimately obtained his consent to search the hotel room, and that Officer Speeth exploited the illegal detention to obtain Gomez's consent.

Gomez did not concede to the District Court, as he now does on appeal, that Officer Speeth may have lawfully detained him on reasonable suspicion after the conclusion of the vehicle search up to the point that he initially refused to consent to a search of the hotel room. However, while this concession narrows the time frame of the illegal detention, it does not waive preservation of the issue of illegal detention without reasonable suspicion presented to the District Court and on appeal. The point is that Gomez was detained illegally, without reasonable suspicion, at the time he ultimately consented to a search of his hotel room. The District Court ruled that there was reasonable suspicion to detain Gomez at that critical moment, and that is the error that was preserved by Gomez's amended motion to suppress and is alleged on appeal.

The State also argues that the issues were not specifically raised because “[t]he proceedings below did not require any evaluation of whether Defendant initially denied the request for consent to search or of what effect his response had on the legality of his continued detention.” Brief of Appellee, p. 12.

This argument is also incorrect. The first part of the argument is incorrect because, as pointed out in Gomez’s brief,² there *was* an evaluation of whether Defendant initially denied the request for consent to search. The State conceded that Gomez initially denied the request for consent by arguing to the District Court that Gomez’s “initial refusal to give consent” indicated that his ultimate consent was voluntary. (R. 101.)

The second part of the argument is incorrect because the District Court *did* consider the effect of Gomez’s refusal to consent on the legality of his continued detention. In support of its ruling that Gomez’s ultimate consent was voluntary, the District Court noted that, after Gomez’s initial refusal to consent, Officer Speeth “asked for permission from the other two occupants before returning to seek consent,” and ruled that Officer Speeth “[was] not required to tell [Gomez] that he was free to leave” when he returned to seek consent again. (R. 118.)

The District Court’s ruling implies that the court believed Gomez was free to leave when Officer Speeth returned to seek his consent again (or, in other words, after Gomez’s refusal to consent the detention de-escalated to a consensual encounter between Officer Speeth and Gomez). This implication is admittedly unclear, however, because the

² See Brief of Appellant, p. 14 n. 1.

District Court also appears to have agreed with Gomez's argument,³ and the State's concession,⁴ that Officer Speeth's detention of Gomez never de-escalated to a consensual encounter. (R. 118.) At any rate, contrary to the State's argument, the District Court considered the effect of Gomez's refusal to consent on the legality of his continued detention.

In sum, Gomez raised the issues that he presents on appeal to a "level of consciousness" before the District Court, and the issues are preserved for appeal. This is perhaps demonstrated best by trial counsel's oral argument before the District Court on the amended motion to suppress:

[T]he key issue I think here is that after all this time, they'd been searched outside of the car, the car had been searched, they had been searched, and they still weren't free to leave. Nothing was found on Mr. Gomez. He still wasn't free to leave. Officer Speeth makes that perfectly clear. Continues to question my client and asks him for permission to search the hotel room. And Mr. Gomez initially says, no, I'm not comfortable with that. And of course what I have said here in my – in my motion was that then Officer Speeth says, well, if your friends are okay with it, would you be okay with it, and – and Mr. Gomez just shrugs his shoulders.

³ R. 88-85.

⁴ R. 106.

(R. 158:10.) The issues presented in Gomez's appeal were preserved, and this Court should decide the appeal on the merits.

II. Reasonable suspicion did not justify Gomez's continued detention after he refused to consent to a search of the hotel room.

In its response brief, the State attacks an argument that Gomez has not presented. Specifically, the State argues that Gomez's initial refusal to consent did not dispel reasonable suspicion because "refusal to consent to search is not considered in determining whether an officer had reasonable suspicion." Brief of Appellee, p. 13 (quoting *State v. McGinnis*, 608 N.W.2d 605, 610 (Neb. App. 2000)).

This argument misses the point. Gomez does not argue that his refusal to consent was an active factor that added to or detracted from reasonable suspicion. Rather, Gomez argues that reasonable suspicion was dispelled after he refused to consent because:

- 1) Officers had already searched the vehicle in which Gomez was a passenger, and found nothing illegal (R. 157:35);
- 2) Officers had searched the passengers in the vehicle, including Gomez, and found nothing illegal (R. 157:15, 36);
- 3) None of the passengers in the vehicle, including Gomez, exhibited signs of drug use (R. 157:43, 45);
- 4) Gomez and other passengers had been questioned regarding illegal activity, and no illegal activity had been discovered (R. 157:10-14, 41); and
- 5) Gomez had been detained at least thirty to forty minutes on a seatbelt violation (R. 157:42).

Officer Speeth's request for consent to search the hotel room at the conclusion of the above events was the culmination of a lengthy investigation into drugs and drug trafficking, which included observation, interrogation, and searches. Gomez's refusal was not a factor in determining reasonable suspicion: it simply foreclosed the last investigative step (a consent search) that could possibly be justified by reasonable suspicion.

At that point, with no illegal items or activities having been discovered, all that remained was Officer Speeth's hunch that Gomez was involved in illegal drug trafficking. But that hunch was not reasonable suspicion, and could not justify Gomez's continued detention. *U.S. v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997) (Inchoate suspicions and unparticularized hunches do not provide reasonable suspicion). *See also State v. Richards*, 2009 UT App 397, ¶ 9, 224 P.3d 733 (“[I]nchoate and unparticularized suspicion or hunch[es]’ do not satisfy the reasonable suspicion standard” (citation omitted)). Officer Speeth had done all he could legally do to quickly confirm or dispel his suspicions, and his hunch could not justify anything further. *See U.S. v. Sharpe*, 470 U.S. 675, 686 (1985); *see also State v. Bissegger*, 2003 UT App 256, ¶¶ 19-20, 76 P.3d 178 (Officers must diligently pursue means of investigation to confirm or dispel their suspicions quickly, and it is unlawful to continue detention after reasonable suspicion is dispelled); *State v. Chism*, 2005 UT App 41, ¶ 20, 170 P.3d 706 (Without the presence of facts supportive of officer's theory that defendant was underage, officer's theory could only be characterized as a hunch not justifying additional detention). Thus,

when Gomez refused to consent to a search of the hotel room, he should have been allowed to leave.

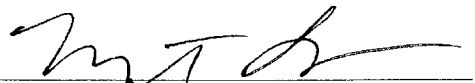
It is important to note the potential negative result if officers were permitted to detain citizens on reasonable suspicion for the purpose of repeatedly requesting consent to search. If officers were authorized to do this, “nothing would be left of Fourth Amendment protections” because citizens could be detained indefinitely on reasonable suspicion until they eventually consented. *See U.S. v. Santos*, 403 F.3d 1120, 1126 (10th Cir. 2005). Surely, this could not be the intention of reasonable suspicion precedents.

Officer Speeth’s continued detention of Gomez, following Gomez’s initial refusal to consent to a search of the hotel room, was illegal because it was not justified by reasonable suspicion. Officer Speeth exploited the illegal detention to obtain Gomez’s consent. The District Court erred in denying Gomez’s motion to suppress, and this Court should reverse Gomez’s conviction.

CONCLUSION AND PRECISE RELIEF SOUGHT

Gomez asks this Court to reverse the District Court's denial of his motion to suppress and Gomez's convictions because Officer Speeth illegally detained Gomez, and exploited the illegal detention to obtain Gomez's consent to search.

DATED this 21 day of September, 2011.


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CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Reply Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 21 day of September, 2011.

